BORA LASKIN LAW LIBRARY
3 1761 06095491 4

WILLS AND ESTATE PLANNING

MATERIALS

ON

WILLS AND SUCCESSION TO PROPERTY

2006

Professor R.E. Scane

These materials are solely for use in the Faculty of Law, University of Toronto

BORA LASKIN LAW LIBRARY
NOV 30 2005
FACULTY OF LAW
UNIVERSITY OF TORONTO

WILLS AND ESTATE PLANNING

MATERIALS

ON

WILLS AND SUCCESSION TO PROPERTY

2006

Professor R.E. Scane

These materials are solely for use in the Faculty of Law, University of Toronto

Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/materialsonwills00scan_7

TABLE OF CONTENTS

2001 - 2002

SECTION A: CONTROLS ON THE RIGHT OF DISPOSITION OF PROPERTY ON DEATH

Part 1: Rights and Elections of Surviving "Spouses" on Death of a "Spouse" regarding "Net Family Property"

Family Law Act, R.S.O. 1990, c. F.3, ss. 1, 2(10), 4-7, 14-16 A.1.1

Act to amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H., S.O. 1999, c. 6, s. 25 A.1.5

Rondberg Estate v. Rondberg Estate (1989), 70 O.R.(2d) 146 A.1.6

Part 2: Protection of Dependants

(A) *The Succession Law Reform Act*

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss 1(1-3), 57-79 A.2.1

Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H, S.O. 1999, c. 6, s.s. 67,68 A.2.6a

Red Tape Reduction Act, S.O. 1999, c. 12, Sch. B, s. 17 A.2.6c

(B) *The Applicant*

Family Law Act, R.S.O. 1990, c. F.3, ss. 1(1), 29-32 A.2.7

Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H., S.O. 1999, c.6, ss. 25, 68 A.2.7a

Re Cooper, (1980), 30 O.R. (2d) 113 A.2.8

Re Mealey and Broadbent, (1984), 47 O.R. (2d) 761 A.2.12

(C) *The Nature and Extent of the Relief Granted*

Re Davies and Davies, (1979), 27 O.R. (2d) 98 A.2.13

McSween v. McSween Estate, (1985), 21 E.T.R.195 A.2.18

Re Dentinger, (1982), 128 D.L.R. (3d) 613 A.2.27

(D) *Contracts and the Legislation*

Schaefer v. Schuhmann, [1972] A.C. 572 (P.C.) A.2.35

(E) *The Power to Vary an Order* A.2.45

(F) *Applicability of Part V of S.L.R.A.* A.2.45

SECTION B: INTESTATE SUCCESSION IN ONTARIO

Part 1: Introduction

Devolution upon the Personal Representative B.1.1

Estates Administration Act, R.S.O. 1990, c. E.22, s. 2 B.1.2

Part 2: Distribution of Property on Intestacy: Deaths Before March 31, 1978

(A) *The Spouse* B.2.1

(i) Wife - Preferential Share B.2.1

(ii) Husband - Preferential Share B.2.2

(iii) No Preferential Share where Deceased Survived by Child of Former Marriage B.2.2

(iv) Distributive Share of Wife B.2.3
-"Legal Representatives" B.2.4
-"per Stirpes" distributions B.2.4

(v) Distributive Share of Husband B.2.6

(vi) Effect of Dower on Share of Wife B.2.7

(vii) Effect of Curtesy on Share of Husband B.2.8

(B) *The Lineal Descendants* B.2.9

- "Advancements" to Children B.2.9

(C) *Lineal Ascendants and Collaterals* B.2.10

- Counting Degrees of Relationship B.2.10

- "Representation" B.2.11

- "per capita" distributions B.2.15

(D) *Illegitimate Children* B.2.16

The Legitimacy Act, R.S.O. 1970, c. 242 B.2.17

(E) *Where No Next of Kin Can be Ascertained* B.2.18

Appendix to Part 2:

- A Short Note on "Curtesy" and "Dower" B.2.19

Part 3: Distribution of Property on Intestacy: Deaths On and After March 31, 1978

(A) *The Succession Law Reform Act* B.3.1

The Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 44-49 B.3.1

(B) *Spouses* B.3.3

(C) *Children and More Remote Issue* B.3.5

(D) *Ascendants and Collaterals* B.3.6

(E) *Children Born Out of Wedlock* B.3.9

(i) *Abolition of "Illegitimacy"* B.3.9

Children's Law Reform Act, R.S.O. 1990, c. C.12, ss.1-2 B.3.10

(ii) *Enquiries* B.3.12

Estates Administration Act, R.S.O. 1990, c.E.22, s.24 B.3.12

(iii) *Proof* B.3.13

Children's Law Reform Act, R.S.O. 1990, c. C.12, ss. 3-10, 12 B.3.13

(F) *Adopted Children* B.3.17

Child and Family Services Act, R.S.O. 1990, c. C.11, ss. 158-159 B.3.17

SECTION BB: INTESTATE SUCCESSION WITH RESPECT TO SOME NATIVE PERSONS

(A) *Introduction*

Note: BB.1.1

Indian Act, R.S.C. 1985, c. I.5, ss.2, 4, 42-44, 47 BB.1.2

(B) *Distribution on Intestacy*

Indian Act, R.S.C. 1985, c. I.5, ss. 48-50 BB.1.4

SECTION C: WILLS - THE MAKING AND REVOCATION OF TESTAMENTARY DOCUMENTS

Part 1: General

(A) *Succession Law Reform Act*

(i) *General Definitions*

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 1 C.1.1

(ii) *What May Be Given by Will*

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 2 C.1.2

(iii) *Applicability of Part 1 of the Act*

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 43 C.1.2

(iv) *The Testamentary Act*

Re MacInnes, [1935] S.C.R. 200 C.1.3

Anderson v. Patton, [1948] 1 D.L.R. 848 (Alta. S.C.) C.1.6

Anderson v. Patton, [1948] 2 D.L.R. 202 (Alta. C.A.) C.1.10

Part 2: Testamentary Capacity, Undue Influence, and Fraud

(A) *Age*

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 8 C.2.1

(B) *The "Sound, Disposing Mind"*

Banks v. Goodfellow (1870), L.R. 5 Q.B.D. 549 C.2.1

Leger v. Poirer, [1944] S.C.R. 152 C.2.10

Re Davis, [1963] 2 O.R. 666 C.2.15

Parker v. Felgate (1883), 8 P.D. 171 C.2.24

O'Neil v. The Royal Trust Company, [1946] S.C.R. 623 C.2.26

(C) *Onus of Proof as to Testamentary Capacity*

Barry v. Butlin (1838), 2 Moo. P.C. 480, 12 E.R. 1089 (P.C.) C.2.33

(D) *Undue Influence, Fraud and "Suspicious Circumstances"*

Wingrove v. Wingrove (1885), 11 P.D. 81 C.2.35

Craig v. Lamoureux, [1920] A.C. 349 (P.C.) C.2.36

Eady v. Waring (1974), 2 O.R. (2d) 627 C.2.41

Vout v. Hay, [1995] 2 S.C.R. 876 C.2.48

Wintle v. Nye, [1959] 1 W.L.R. 284 C.2.54

Russell v. Fraser (1981), 118 D.L.R. (3d) 733 C.2.65

Re Worrell, [1970] 1 O.R. 184 C.2.72

Cory, "A Whirl with Re Worrell", (1971) 5 LSUC Gazette 274 C.2.76

Part 3: Making of a Will - Formal Requirements

(A) *Conflict of Laws*

(i) *The Succession Law Reform Act*

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 34-41 C.3.1

(ii) *The "International Will"*

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 42 C.3.2

(iii) Revocation by Marriage

Allison v. Allison (1999), 23 E.T.R.(2d) 237 C.3.5a

(B) *Special Situations*

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 5 C.3.6

Indian Act, R.S.C. 1985, c. I.5, ss. 45, 46 C.3.6a

(C) *"Formal" Wills*

Succession Law Reform Act, R.S.O. 1990, c.S.26, ss. 3, 4, 7 C.3.7

(i) *"In writing"*

Murray v. Haylow, (1927), 60 O.L.R 535 C.3.8

(ii) *Signed at End "by the testator or by some other person in his or her presence and by his or her direction"*

Re White, [1948] 1 D.L.R. 572 C.3.9

Re Deeley and Green (1929), 64 O.L.R. 535 C.3.13

(iii) *Attestation*

Chesline v. Hermiston (1928), 62 O.L.R. 575 C.3.14

Smith v. Smith (1866), 1 P. & D. 143 C.3.16

Brown v. Skirrow, [1902] P. 3 C.3.22

Re Brandrick and Cockle (1999), 146 D.L.R.(4th) 113 C.3.19

Re Brandrick and Cockle (1999),23 E.T.R.(2d) 233 (C.A.) C.3.23

Re Chalcroft, [1948] P. 222 C.3.24

(iv) *Witnesses*

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 11-14 C.3.31

Re Trotter, [1899] 1 Ch. 764 C.3.32

Thorpe v. Bestwick (1881), 6 Q.B.D. 311 C.3.34

Re Ray's Will Trusts, [1936] 1 Ch. 521 C.3.35

Sisson v. Park Street Baptist Church (1999), 24 E.T.R.(2d) 18 C.3.36a

(D) ***Holograph Wills***

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 6.7 C.3.37

Bennett v. Gray, [1958] S.C.R. 392 C.3.38

Re Kinahan (1981), 9 E.T.R. 392 C.3.41

Dilts v. Roman Catholic Episcopal Corp. of the Diocese of London in Ontario, Ont. Ct. (Gen. Div.) April 15.1998 C.3.42a

Re Austin (1967), 61 D.L.R. (2d) 582 C.3.43

Re Philip (1979), 100 D.L.R. (2d) 582 C.3.48

Re Forest (1979), 5 E.T.R. 144 C.3.52

Re Forest (1981), 8 E.T.R. 232 C.3.57

(E) ***Incorporation by Reference***

In the Goods of Smart [1902] P.238 C.3.60

Re Mihalopulos (1956), 5 D.L.R. (2d) 628 C.3.62

Re Coate (1987) 26 E.T.R. 161 C.3.67

Part 4: Revocation or Alteration of Wills

(A) *General*

Succession Law Reform Act. R.S.O. 1990. c. S.26. ss. 15-17 (i) C.4.1

(B) ***Revocation by Operation of Law***

(i) *Subsequent Marriage*

Re Langston. [1953] P. 100 C.4.2

Re Pluto (1969). 6 D.L.R. (3d) 541 C.4.4

Re Coleman. [1976] Ch. 1 C.4.6

Layer v. Burns Philp Trustee Co. Ltd.. (1986). 6 N.S.W.L.R. 60 C.4.11

Note re Conflict of Laws C.4.15a

(ii) *Wills Made in Exercise of a Power of Appointment*

Re Paul. [1921] 2 Ch. 1 C.4.16

Re Gilligan. [1949] 2 All E.R. 401 (P.D.) C.4.18

(iii) *Divorce*

Re Majetka (1984). 8 D.L.R. (4th) 481 C.4.20

Page Estate v. Sachs (1993). 12 O.R. (3d) 371 C.4.23

(C) ***Revocation by Act of the Testator***

(i) *By Subsequent Testamentary Document: Express or Implied Revocation*

Re Davies. [1928] 1 Ch. 24 C.4.26

Re Robinson. [1930] 2 Ch. 332 C.4.29

Re Bryan. [1907] p. 125 C.4.31

(ii) *By Physical Act*

Cheese v. Lovejoy (1887). L.R. 2 P.D. 251 C.4.34

Leonard v. Leonard. [1902] P. 243 C.4.35

Re Kruschel Estate (1991). 40 E.T.R. 129 C.4.37

Gill v. Gill. [1909] P. 157 C.4.41

(iii) *By Alteration to the Will Document*

Succession Law Reform Act. R.S.O. 1990. c. S.26. s. 18 C.4.42

Re Itter. [1950] P. 130 C.4.43

King Estate v. King-Fleming (Dec. 11. 1995) C.4.45

(D) ***Revocation by Act of the Testator: Conditional Revocation (Including Herein the Revival of Previously Revoked Wills)***

Giles v. Warren (1872). L.R. 2 P. & D. 401. C.4.48

Re Southerden, [1925] P.177 C.4.49

Re Sorenson (1982), 10 E.T.R. 282 C.4.52

Dixon v. Treasury Solicitor, [1905] P. 42 C.4.55

Re Service [1964] 1 O.R. 197 C.4.57

Succession Law Reform Act, R.S.O. 1990, c. S.26, s 19 C.4.60

Re Hodgkinson, [1893] P. 339 (C.A.) C.4.61

Re Ott, [1972] 2 O.R. 5 C.4.62

Re Jones, [1976] 1 Ch. 201 C.4.65

Part 5: Curative Statutory Provisions

George v. Daily (1997), 15 E.T.R. 1 (Man. C.A.) C.5.1

Part 6: Correction of Mistakes in the Will: The Probate Jurisdiction

{This Part is omitted in 2001 - 2002 Materials}

(A) ***The Common Law Jurisdiction***

Guardhouse v. Blackburn (1866), L.R. 1 P.&D. 109 C.6.1

Re Horrocks, [1939] P. 198 C.6.5

Re Doner (1931), 40 O.W.N. 120 C.6.10

Guardian, Trust, and Executors Co. of New Zealand Ltd. v. Inwood, [1946] N.Z.L.R. 614 C.6.11

Re Brander, [1952] 4 D.L.R. 688 C.6.16

Re Morris, [1971] P. 62 C.6.17

Re Reynette-James, [1976] 1 W.L.R. 161 C.6.23

Re Phelan, [1972] Fam. 33 C.6.26

Re Tait, [1957] V.R. 405 C.6.27

(B) ***A Statutory Remedy***

Administration of Justice Act 1982 (U.K.), 1982, c. 53, s.20 C.6.33

Note: Wordingham v. Royal Exchange Trust Co. Ltd. C.6.33

(C) ***The Jurisdiction of the Court of Construction Compared***

Re Craig (1977), 14 O.R. (2d) 589 (High Court of Justice) C.6.34

Re Craig (1978), 42 O.R. (2d) 567 (Court of Appeal) C.6.42

SECTION D: THE CONSTRUCTION OF VALID TESTAMENTARY DOCUMENTS

Part 1: General Principles

Perrin v. Morgan, [1943] A.C. 399 D.1.1

Re Price, [1955] O.W.N. 18 D.1.6

Re Helliwell, [1916] 2 Ch. 580 D.1.8

Re Cook, [1948] 1 Ch. 213 D.1.10

Part 2: The Testator's Armchair

Note re Higgins v. Dawson D.2.0a

Higgins v. Dawson, [1902] A.C. 1 D.2.1

The National Society for the Prevention of Cruelty to Children v. The Scottish National Society for the Prevention of Cruelty to Children, [1915] A.C. 207 D.2.6

Re Glassington, [1906] 2 Ch. 305 D.2.8

Re Ofner, [1909] 1 Ch. 60 D.2.10

Re Smalley, [1929] 2 Ch. 113 D.2.14

Re Herlichka, [1969] 1 O.R. 724 D.2.17

Re Van Lessen, [1955] 1 W.L.R. 1326 D.2.19

Re Jeffery, [1914] 1 Ch. 375 D.2.21

Re Ottewell (1970), 9 D.L.R. (3d) 314 D.2.22

Haidl v. Sacher (1978), 2 E.T.R. 288 (Saskatchewan Q.B.) D.2.24

Hickey v. Grieg (1987), 27 E.T.R. 17 D.2.30

Part 3: Direct Evidence of Intention

Doe d. Gord v. Needs (1836), 2 M. & W. 363; 150 E.R. 698 D.3.1

Doe d. Simon Hiscocks v. John Hiscocks (1839), 5 M. & W. 363; 151 E.R. 154 D.3.2

Re Gray, [1934] O.W.N. 17 D.3.3

Re Ray, [1916] 1 Ch. 461 D.3.5

Administration of Justice Act, 1982 (U.K.), 1982, c. 53, s. 21 D.3.7

Re Williams, [1985] 1 W.L.R. 905 D.3.8

Part 4: Problems as to Nature of Property Disposed of By the Will

(A) *The Classification of Legacies, and the Consequences Thereof: Ademption and Abatement*

Note: Problems Relating to the Disposition of Property Described in the Will D.4.1

Re Willcocks, [1921] 2 Ch. 327 D.4.4

Re Millar (1927), 60 O.L.R. 434 D.4.5

Page v. Leapingwell (1812), 18 Ves. Jn. 463; 34 E.R. 392 D.4.7

Re Webster, [1937] 1 All E.R. 602 D.4.9

Re Culbertson (1967), 62 D.L.R. (2d) 134 (Saskatchewan Court of Appeal) D.4.11

Re Hunter (1975), 8 O.R. (2d) 399 D.4.13

Mental Health Act, R.S.O. 1990, c. M.7, s. 64 D.4.15

Mental Incompetency Act, R.S.O. 1990, c. M.9, s. 18 (1) D.4.15

Substitute Decisions Act, S.O. 1992, c. 30, s. 36 D.4.15

Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, 1996 D.4.15

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 20 D.4.16

(B) *The Time from Which a Will "Speaks" with Respect to Property*

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 21, 22 D.4.17

Goodland v. Burnett (1885), 1 K. & J. 341; 69 E.R. 489 D.4.17

Re Thompson (1919), 45 O.L.R. 520 D.4.19

Re Sikes, [1927] 1 Ch. 365 D.4.22

Re Rutherford (1918), 42 O.L.R. 405 D.4.23

Re Portal and Lamb (1885), 30 Ch. D. 50 D.4.24

Morrison v. Morrison (1885), 10 O.R. 303 D.4.27

Re Forbes (1956), 3 D.L.R. (2d) 653 D.4.31

Re Bird , [1942] O.R. 415 D.4.33

(C) *The Possible Effect of the Equitable Doctrine of Conversion*

Church v. Hill, [1923] S.C.R. 642 D.4.36

Hicks v. McClure (1922), 64 S.C.R. 361 D.4.39

Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 20 D.4.40

(D) *Is the Property Really Gone, or Just Disguised?*

Re Clifford, [1912] 1 Ch. 29 D.4.41

Re Brems, [1963] 1 O.R. 122 D.4.43

Re Cudeck (1977), 16 O.R. (2d) 337 (C.A.) D.4.44

Doyle v. Doyle Estate (1995), 9 E.T.R.(2d) 162 D.4.47

Doyle v. Doyle Estate (1998), 22 E.T.R.(2d) 17 (C. A.) D.4.51

Part 5: Some Problems Arising as Change Affects Beneficiaries

(A) *Where a Beneficiary Named in the Will Predeceases the Testator: The Doctrine of Lapse*

Note on the Doctrine of Lapse D.5.1

Re Ladd, [1932] 2 Ch.219 D.5.5

Re Mackie (1986), 54 O.R. (2d) 784 D.5.8

Re Greenwood, [1912] 1 Ch.392 D.5.11

Re Cousen's Will Trusts, [1937] 1 Ch. 381 D.5.13

Conveyancing and Law of Property Act. R.S.O. 1990. c. C.34. s. 13 D.5.18

Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H.. S.O. 1999. c. 6. s.13 D.5.18

Re Gamble (1906). 13 O.L.R. 299 D.5.18a

Succession Law Reform Act. R.S.O. 1990. c. S.26. s. 31 D.5.19

Doucette v. Fedoruk Estate (1993). 49 E.T.R. 199 D.5.20

(B) *Commorientes Legislation*

Succession Law Reform Act. R.S.O. 1990. c. S.26. ss. 55. 56 D.5.23

Insurance Act. R.S.O. 1990. c. I.8. ss. 215. 194 D.5.24

Insurance Act. R.S.O. 1990. c. I.8. ss. 319. 314(1). 314(2) D.5.24

(C) *Class Gifts*

(i) *General*

Note: Gifts to Classes D.5.25

(ii) *Is the Gift a "Class Gift"?*

Kingsbury v. Walter. [1901] A.C. 187 D.5.27

Re Jackson (1880). 25 Ch.D.162 D.5.31

Re Telfer. [1964] 1 O.R. 373 D.5.34

Re Hutton (1983). 39 O.R. (2d) 622 D.5.35

Re Burgess (1968). 67 D.L.R. (2d) 526 D.5.38

(iii) *Determining the Membership of the Class: the "Class-Closing Rules"*

Re Chartres. [1927] 1 Ch. 466 D.5.43

Re Bleckly. [1951] 1 Ch. 740 D.5.48

Latta v. Lowry (1886). 11 O.R. 517 D.5.54

Re Clifford's Settlement Trusts. [1981] 1 Ch. 63. D.5.55

Rogers v. Mutch (1878). 10 Ch. D. 25 D.5.58

The Perpetuities Act. R.S.O. 1990. c. P.9. s. 7 D.5.59

The Trustee Act. R.S.O. 1990. c. T.23. s. 65 D.5.60

SECTION E: WILLS AND ESTATES CHECKLIST

Checklist and Notes prepared by the Professional Standards Committee. Law Society of Upper Canada. June. 1995 E.1.1